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Draft provisions on electronic transferable records

Note by the Secretariat

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I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.[1]

2. At its forty-sixth session (Vienna, 29 October-2 November 2012), broad support was expressed by the Working Group for the preparation of draft provisions on electronic transferable records, to be presented in the form of a model law without prejudice to the decision on the form of its work to be made by the Working Group (A/CN.9/761, paras. 90-93).

3. At its forty-seventh session (New York, 13-17 May 2013), the Working Group began reviewing the draft provisions on electronic transferable records as provided in document A/CN.9/WG.IV/WP.122 and noted that while it was premature to start a discussion on the final form of work, the draft provisions were largely compatible with different outcomes that could be achieved.

4. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its consideration of the draft provisions as provided in A/CN.9/WG.IV/WP.124 and Add.1. Part II of this note contains the draft provisions reflecting the deliberations and decisions of the Working Group during that session (A/CN.9/797, paras. 16-114).

II. Draft provisions on electronic transferable records

A. General

"Draft article 1. Scope of application

"1. This Law applies to electronic transferable records.

"2. Nothing in this Law affects the application of any rule of law governing a paper-based transferable document or instrument to an electronic transferable record other than as provided for in this Law.

"[3. This Law applies to electronic transferable records other than as provided by [law governing a certain type of electronic transferable record to be specified by the enacting State].]"

Remarks

5. Draft article 1 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 16-17).

6. Draft article 1, paragraph 3, is placed in square brackets as it would only be applicable in States that have enacted legislation on electronic transferable records that exist only in an electronic environment. In such case, paragraph 3 aims at allowing the application of the draft provisions also to those electronic transferable records, without interfering with their substantive law. Hence, this paragraph would not be necessary in jurisdictions where no such electronic transferable record exists.

[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

The Working Group agreed that a decision on paragraph 3 could only be made in light of the final form of the draft provisions, which has not yet been determined (A/CN.9/797, para. 17).

"Draft article 2. Exclusion

"1. This Law does not override any rule of law applicable to consumer protection.

"2. This Law does not apply to securities, such as shares and bonds, and other investment instruments.

"3 [This Law does not apply to bills of exchange, promissory notes and cheques.]"

Remarks

7. Draft article 2 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 18-20). The term "investment instrument" is understood to include derivative instruments, money market instruments and any other financial product available for investment (A/CN.9/797, para. 19).

8. As a reference, the Working Group may wish to compare the language used in the Regulation (EC) No 864/2007 of the European Parliament ("Rome II Regulation"),[2] to exclude from the application of the Rome II Regulation "non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character". Therefore, it is understood that "other transferable documents, such as investment securities and loans"[3] fall within the scope of the Rome II Regulation. However, the ultimate result may depend on domestic law, as, for instance, in certain jurisdictions shares and bonds are considered negotiable instruments and would therefore be excluded from the scope of the Rome II Regulation.

9. Paragraph 3 reflects the view that, if the final form of the draft provisions were a treaty, certain paper-based transferable documents or instruments should be excluded from its scope of application in order to avoid conflicts with other treaties such as the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931) (the "Geneva Conventions") (A/CN.9/797, paras. 20, 109-112; see also A/CN.9/WG.IV/WP.125).

10. Moreover, if the final form of the draft provision were a model law, the Working Group may wish to consider whether paragraph 3 should be retained to provide guidance to those jurisdictions that are parties to the Geneva Conventions as well as any other relevant conventions when they wish to enact that model law.

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[2] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II Regulation"), Official Journal L 199, 31/7/2007, P. 40-49.

[3] See Philip R. Wood, Conflict of Laws and International Finance (The Law and Practice of International Finance, Vol. 6), 2007, sub 11-043.

"Draft article 3. Definitions

"For the purposes of this Law:

Remarks

11. The definitions in draft article 3 have been prepared as a reference and should be examined in the context of the relevant draft articles. The terms are presented in the order they appear throughout the draft provisions (A/CN.9/768, para. 34). Remarks for consideration by the Working Group have been placed after each definition.

12. In addition to the remarks below, the Working Group may wish to clarify in draft article 3 that a "person" may either be a natural or a legal person.

"*electronic transferable record*" means [an electronic record] that entitles the holder to claim the performance of the obligation [indicated] in the record and that is capable of transferring the right to performance of the obligation [indicated] in the record through the transfer of that record.

["*paper-based transferable document or instrument*" means a transferable document or instrument issued on paper that entitles the holder to claim the performance of the obligation [indicated] in the document or instrument and that is capable of transferring the right to performance of the obligation [indicated] in the document or instrument through the transfer of that document or instrument.]

[Paper-based transferable documents or instruments include bills of exchange, cheques, promissory notes, [consignment notes,] bills of lading and warehouse receipts.]

Remarks

13. The definitions of "electronic transferable record" and "paper-based transferable document or instrument" reflect the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 21-28). These definitions do not aim at affecting the fact that substantive law shall determine whether the holder is the rightful holder and the substantive rights of the holder.

14. The Working Group confirmed that certain documents or instruments, which are generally transferable, but whose transferability is limited due to other agreements, such as straight bills of lading, would not fall under either of these two definitions, and that the draft provisions should only focus on "transferable" documents (A/CN.9/797, para. 27-28).

15. The Working Group may wish to consider whether the term "[indicated]" in square brackets in both definitions is appropriate or whether other terms might be used such as "incorporated", "specified" or "contained" (A/CN.9/797, para. 22).

16. The Working Group may wish to refer to the definition of "electronic record" when considering the definition of "electronic transferable record".

17. The Working Group may wish to consider deleting the definiti n of paper-based transferable document or instrument as it deals with substantive law matters.

18. The Working Group may wish to consider whether the indicative list of paper-based transferable documents or instruments, along the lines contained in article 2, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the "Electronic Communications Convention"), should be included in the definition of "paper-based transferable document or instrument" or in explanatory material (A/CN.9/768, para. 34 and A/CN.9/797, paras. 25 and 26). The Working Group may also wish to consider whether to retain the reference to consignment notes, which are not transferable in certain jurisdictions.

"*electronic record*" means information generated, communicated, received or stored by electronic means[, including, where appropriate, all information logically associated or otherwise linked [together] [thereto] [so as to become part of the record], whether generated contemporaneously or [not] [subsequently].

Remarks

19. The definition of "electronic record" is based on the definition of "data message" contained in the UNCITRAL Model Law on Electronic Commerce, 1996, and in the Electronic Communications Convention, yet highlighting the fact that other information might be associated with the electronic transferable record at the time of issuance or thereafter (e.g., information related to endorsement) (A/CN.9/797, paras. 43-45). The bracketed text is meant to clarify that some electronic records could, but do not need to, include a set of composite information (A/CN.9/797, para. 43).

"*issuer*" means a person that issues [directly, or with the assistance of a third party,] an electronic transferable record [on its own behalf].

Remarks

20. The Working Group may wish to consider whether to retain the definition of "issuer" in light of the deletion of a draft provision on issuance (A/CN.9/797, paras. 64-67).

21. If the definition of "issuer" is retained, the Working Group may wish to consider whether it should add to that definition the words [directly, or with the assistance of a third party], which aim at clarifying that when an electronic transferable record is issued by a third party upon the issuer's request, the third party is not considered an issuer under the draft provisions.

"*control*" of an electronic transferable record means the [de facto power to deal with or dispose of that electronic transferable record] [power to factually deal with or dispose of the electronic transferable record] [control in fact of the electronic transferable record].

Remarks

22. The Working Group suggested that a definition of "control" could be added (A/CN.9/797, para. 83).

"*holder*" of an electronic transferable record is a person in control of the electronic transferable record [in accordance with article 18].

Remarks

23. The Working Group may wish to consider whether the definition of holder accurately reflects the Working Group's conclusion (A/CN.9/768, para. 86) and clarifies that a holder of an electronic transferable record would need to have only control of the electronic transferable record to be considered a holder. Whether the person in control is the rightful holder and the substantive rights of the holder are matters for the substantive law (A/CN.9/WG.IV/WP.122, paras. 29 and 31).

24. The Working Group may wish to consider whether the words [in accordance with article 18] should be deleted to capture instances in which the holder did not receive control from a transferor, e.g., in case of theft of an electronic transferable record.

"*transfer*" of an electronic transferable record means the transfer of control over an electronic transferable record.

Remarks

25. The Working Group may wish to consider whether to retain this definition in light of draft article 23 on transfer.

"*amendment*" means the modification of information contained in the electronic transferable record in accordance with the procedure set out in draft article 24.

Remarks

26. The Working Group may wish to consider whether to retain this definition in light of draft article 24 on amendment and the remarks to that draft article.

"*performance of obligation*" means the delivery of goods or the payment of a sum of money as specified in a paper-based transferable document or instrument or an electronic transferable record.

Remarks

27. The Working Group may wish to consider whether to retain this definition, which refers generally to the delivery of goods or the payment of a sum of money as mentioned in article 2, paragraph 2, of the Electronic Communications Convention (A/CN.9/761, para. 22).

"*obligor*" means the person specified in a paper-based transferable document or instrument or an electronic transferable record who has the obligation to perform.

Remarks

28. The Working Group may wish to consider whether the definition of "obligor" should be retained in light of the fact that that notion may be defined under substantive law. In case of retention of that definition, the Working Group may wish to further clarify in the definition that substantive law would address who the obligor is.

"*replacement*" means substitution of a paper-based transferable document or instrument with an electronic transferable record or [vice versa] [conversely].

Remarks

29. The Working Group may wish to consider whether the definition should be limited to instances where there is change only in the medium in accordance with the procedure set out in draft article 26 or whether it should be broadened to include instances where an electronic transferable record was issued to substitute for another electronic transferable record (see A/CN.9/WG.IV/WP.124/Add.1, para. 27).

> "*third-party service provider*" means a third party providing services related to [the use of] electronic transferable records in accordance with articles 31 and 32."

30. The Working Group may wish to consider whether the words [the use of] should be deleted to ensure consistency with the definition of "certificate service provider" contained in article 2(e) of the UNCITRAL Model Law on Electronic Signatures (2001).

> ***"Draft article 4. Interpretation***
>
> "1. This Law is derived from [...] of international origin. In the interpretation of this Law, regard is to be had to the international origin and to the need to promote uniformity in its application [and the observance of good faith].
>
> "2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

Remarks

31. Draft article 4 is intended to draw the attention of courts and other authorities to the fact that the draft provisions should be interpreted with reference to their international origin in order to facilitate their uniform interpretation (A/CN.9/768, para. 35). The square bracketed text in paragraph 1 would depend on the final form of the draft provisions and the paragraph itself would need to be revised accordingly.

32. While the term "general principles" in paragraph 2 has been used in several UNCITRAL texts, article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("CISG") is the provision containing that term that has been most interpreted by case law.

33. The UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2012) lists several general principles relevant to article 7 of the CISG according to case law, including: party autonomy; estoppel; place of payment of monetary obligations; mitigation of damages; and *favor contractus*. Those general principles are contained in specific provisions of the CISG and applied in other cases falling under the scope of the CISG.

34. However, not all the general principles that have been identified in the CISG gather the same level of support in being recognized as such. Moreover, determination of the content and operation of those general principles takes place progressively. Such progressive determination assists in ensuring flexibility in interpreting the CISG and adapting it to evolving commercial practices and business needs.

35. The notion of "general principles" contained in draft article 4 paragraph 2 refers to the general principles of electronic transactions (A/CN.9/797, para. 29), including those already stated in relevant UNCITRAL texts. In this line, the Working Group may wish to confirm that the three fundamental principles of non-discrimination of electronic communications, technological neutrality and functional equivalence should be considered as general principles underlying the draft provisions. Some of the general principles underlying the CISG, such as party autonomy and good faith, may also be relevant. In that respect, the Working Group may wish to consider whether a reference to good faith should be retained in the context of the draft provisions also in light of the fact that it is contained in other UNCITRAL texts on electronic commerce. Other general principles might be identified as the work of the Working Group makes progress.

"Draft article 5. Party autonomy [and privity of contract]

"1. The parties may derogate from or vary by agreement the provisions of this Law [except articles 6, 7 and ...]

"2. Such an agreement does not affect the rights of any person that is not a party to that agreement."

Remarks

36. The Working Group highlighted the importance of party autonomy in the draft provisions (A/CN.9/797, para. 30) and, based on the general applicability of that principle, agreed to identify which draft articles could not be derogated from (A/CN.9/797, para. 32). It is suggested that such identification should be carried out at a later stage of preparation of the draft provisions, pending, in particular, discussion on the provisions relating to third-party service providers.

"Draft article 6. Information requirements

"Nothing in this Law affects the application of any rule of law that may require a person to disclose its identity, place of business or other information, or relieves a person from the legal consequences of making inaccurate, incomplete or false statements in that regard."

37. The Working Group decided to retain draft article 6 with the understanding that it reminds parties of the need to comply with possible disclosure obligations that might exist under other law (A/CN.9/797, para. 33).

B. Provisions on electronic transactions

"Draft article 7. Legal recognition of an electronic transferable record

"An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form."

"Draft article 8. Writing

"Where the law requires that information should be in writing or provides consequences for the absence of a writing, that requirement is met with respect to the use of an electronic transferable record if the information contained

in the electronic transferable record is accessible so as to be usable for subsequent reference."

Remarks

38. Draft article 8 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 36-39).

39. The Working Group may wish to confirm that the words "information contained therein" refer to the information contained in an electronic transferable record, and that general electronic transactions law would establish functional equivalence for writing requirements when the information is not contained in the electronic transferable record.

"Draft article 9. Signature

"Where the law requires a signature of a person or provides consequences for the absence of a signature, that requirement is met with respect to the use of an electronic transferable record if:

(a) A method is used to identify that person and to indicate that person's intention in respect of the information contained in the electronic transferable record; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic record was generated, in the light of all the relevant circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence."

Remarks

40. Draft article 9 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 40-46).

41. The Working Group may wish to consider draft article 9 in conjunction with the revised definition of the term "electronic record" contained in draft article 3.

Draft articles on original, uniqueness and integrity

42. At the forty-eighth session of the Working Group, it was noted that the notion of "original" in the context of electronic transferable records was different from that adopted in other UNCITRAL texts (A/CN.9/797, para. 47).

43. With respect to the notion of uniqueness, at that session support was expressed for the view that uniqueness was not a general requirement for electronic transferable records and that in practice, it could be very difficult to achieve uniqueness in an electronic environment. In that line, uniqueness should not be perceived as a quality on its own and emphasis should rather be on the function that uniqueness achieves, namely, prevention of multiple claims. Various methods to replicate that function existed in an electronic environment that did not necessarily require uniqueness. In some cases, the notion of control could suffice to prevent the

risk of exposing the debtor (obligor) to multiple requests for performance (A/CN.9/797, paras. 48 and 50).

44. The following options reflect the discussion by the Working Group at its forty-eighth session on the possible formulations of the draft articles on original, uniqueness and integrity (A/CN.9/797, paras. 58-59).

Option A

"Draft article 10. Original

"Where the law requires [the original of] a paper-based transferable document or instrument, or provides consequences for [the absence of the original] [its absence], that requirement is met with respect to the use of an electronic transferable record if a reliable method is employed:

(a) [to render the electronic transferable record unique, or to identify the electronic transferable record as containing the authoritative information constituting the electronic transferable record] [to render the electronic transferable record identifiable as such and to prevent its unauthorized replication] [in accordance with draft article 11]; and

(b) to retain the integrity of the electronic transferable record [from the time of its issuance, apart from the additions of any change that arises throughout the life cycle of the electronic transferable record] [in accordance with draft article 12]."

"Draft article 11. Uniqueness of an electronic transferable record

"1. A reliable method shall be employed [to render the electronic transferable record unique, or to identify the electronic transferable record as containing the authoritative information constituting the electronic transferable record] [to render the electronic transferable record identifiable as such and to prevent its unauthorized replication].

"2. A method satisfies paragraph 1, if it:

(a) Designates an authoritative copy of an electronic transferable record, which is readily identifiable as such; and

(b) Ensures that the authoritative copy of an electronic transferable record cannot be reproduced."

"3. For the purposes of paragraph 1, the standard of reliability required shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances."

"Draft article 12. Integrity of an electronic transferable record

"1. A reliable method shall be employed to retain the integrity of an electronic transferable record from its issuance.

"2. For the purposes of paragraph 1:

(a) The criteria for assessing integrity shall be whether the information contained in the electronic transferable record has remained complete and

unaltered, apart from the addition of any change that arises throughout the life cycle of the electronic transferable record; and

(b) The standard of reliability required shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances."

Remarks

45. Under option A, draft article 10 aims at establishing a rule on functional equivalence between electronic transferable records and the original of a paper-based transferable document or instrument (A/CN.9/797, paras. 47 and 52; see also A/CN.9/768, paras. 49 and 50).

46. Draft article 10 aims at providing a functional equivalence of the notion of "original" specific to electronic transferable records by incorporating the elements of integrity and uniqueness. The Working Group may wish to consider whether draft articles 11 and 12 should also be retained, and in what form.

47. The wording of draft article 10 departs from that of article 8 of the Model Law on Electronic Commerce and article 9 of the Electronic Communications Convention because of the different notion of "original" in the context of electronic transferable records (see para. 42 above).

48. The Working Group may wish to consider whether reference to "the original of" is necessary in draft article 10, paragraph 1, in light of the possible lack of reference to "original" in the substantive law (A/CN.9/797, paras. 53-55).

49. The words [from the time of its issuance, apart from the additions of any change that arises throughout the life cycle of the electronic transferable record] have been added as a possible drafting suggestion to better capture the notion of "original" as applied to a paper-based transferable document or instrument. The Working Group may wish to further discuss the matter also in relation with the notion of "integrity".

50. The second set of bracketed text in draft article 10(a) aims at addressing a concern on the technical implementation of the notion of uniqueness (A/CN.9/797, para. 57).

51. The words [prevent unauthorized replication of an electronic transferable record] have been added as a drafting option in draft article 11 to reflect the function of uniqueness, which is preventing unauthorized replication of the electronic transferable record, rather than the notion of uniqueness per se. This approach might be preferable in light of the fact that certain systems, such as those registry-based, may not need a method to achieve uniqueness but can prevent unauthorized replication otherwise (A/CN.9/797, para. 50).

52. The Working Group may wish to discuss the relation between the notions of "copy", "replication" and "reproduction".

53. The Working Group at its forty-eighth session decided to retain draft articles 7-10 as a separate section (A/CN.9/797, para. 34). The Working Group may wish to review its decision in light of the final form of the draft provisions as well as the content of draft articles 10, 11 and 12.

Option B

"Draft article 10. Original

"1. Where the law requires [the original of] a paper-based transferable document or instrument, or provides consequences for [the absence of the original] [its absence], that requirement is met with respect to the use of an electronic transferable record if a reliable method is employed:

(a) [to render the electronic transferable record unique, or to identify the electronic transferable record as containing the authoritative information constituting the electronic transferable record] [to render the electronic transferable record identifiable as such and to prevent its unauthorized replication]; and

(b) to retain the integrity of the electronic transferable record.

"2. For the purposes of subparagraph 1(a), the criteria for assessing uniqueness shall be:

(a) whether the electronic transferable record is identified as containing the authoritative information constituting the electronic transferable record; and

(b) whether its unauthorized replication is prevented.

"3. For the purposes of subparagraph 1(b):

(a) The criteria for assessing integrity shall be whether the information contained in the electronic transferable record has remained complete and unaltered, apart from the addition of any change that arises throughout the life cycle of the electronic transferable record; and

(b) The standard of reliability required for integrity shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances."

54. Draft article 10 of Option B provides a functional equivalence rule for the "original" requirement with the notions of uniqueness and integrity supporting such a rule (A/CN.9/797, para. 58). Under Option B, draft articles 10, 11 and 12 of Option A would be merged (A/CN.9/797, para. 58). The Working Group may wish to refer to paragraphs 45-53 above when considering Option B.

55. The Working Group may wish to consider introducing the provision contained in draft article 11, paragraph 2 of Option A in draft article 10 of Option B.

Option C

"Draft article 10. Original

"Where the law requires [the original of] a paper-based transferable document or instrument, or provides consequences for the absence [of the original] [its absence], that requirement is met with respect to the use of an electronic transferable record if a reliable method is employed:

(a) [to render the electronic transferable record unique, or to identify the electronic transferable record as containing the authoritative information

constituting the electronic transferable record] [to render the electronic transferable record identifiable as such and to prevent its unauthorized replication]; and

(b) to retain the integrity of the electronic transferable record [from the time of its issuance, apart from the additions of any change that arises throughout the life cycle of the electronic transferable record]."

"Draft article 11. General reliability standard

"1. In determining reliability for the purposes of [articles 10, 18, 24, 27, 28 and 29 and ...] regard shall be had to the extent to which the method employed is able to ensure data integrity and to prevent unauthorized access to and use of the [system] [method].

"2. In determining whether, or to what extent, a method is reliable for the purposes of [articles 10, 18, 24, 27, 28 and 29 and ...], regard may be had to the following factors:

(a) Level of assurance of data integrity;

(b) Ability to prevent unauthorized access to and use of the system;

(c) Quality of hardware and software systems;

(d) Regularity and extent of audit by an independent body;

(e) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method; or

(f) Any other relevant factor."

Remarks

56. A third drafting suggestion was to recast draft articles 10, 11 and 12 as two draft articles, one providing a functional equivalence rule for "original" and another providing the reliability test for uniqueness and integrity (A/CN.9/797, para. 59). The Working Group may wish to refer to paragraphs 45-50 and 53 above when considering Option C.

57. Draft article 11 aims to offer guidance on possible elements to be considered when assessing reliability of a method used during the life cycle of an electronic transferable record. The Working Group may wish to consider draft article 11 in conjunction with draft article 19, dealing with reliability of method of control. The Working Group may also wish to consider deleting the words [articles 10, 18, 24, 27, 28 and 29 and ...] so as to provide a general reliability test that could be added to the draft provisions.

58. Draft article 11, paragraph 2 is inspired by article 10 of the UNCITRAL Model Law on Electronic Signatures, which provides guidance on how to assess trustworthiness of systems, procedures and human resources used by a certification service provider (A/CN.9/797, para. 89).